

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DAWN L. H.,

Plaintiff,

v.

Civil Action No.
5:23-CV-480 (DEP)

MARTIN J. O'MALLEY,
Commissioner of Social Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LEGAL AID SOCIETY OF
MID-NEW YORK, INC.
221 S. Warren Street, Suite 310
Syracuse, NY 13202

ELIZABETH V. LOMBARDI, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
6401 Security Boulevard
Baltimore, MD 21235

JASON P. PECK, ESQ.

¹ Plaintiff's complaint named Kilolo Kijakazi, in her official capacity as the Acting Commissioner of Social Security, as the defendant. On December 20, 2023, Martin J. O'Malley took office as the Commissioner of Social Security. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.² Oral argument was conducted in connection with those motions on April 18, 2024, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

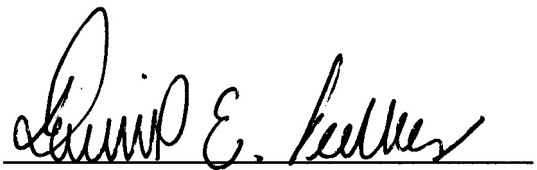
After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by

² This action is timely, and the Commissioner does not argue otherwise. It has been treated in accordance with the procedures set forth in the Supplemental Social Security Rules and General Order No. 18. Under those provisions, the court considers the action procedurally as if cross-motions for judgment on the pleadings have been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: April 22, 2024
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
DAWN L. H.,

Plaintiff,

vs.

5:23-CV-480

MARTIN J. O'MALLEY,
Commissioner of Social Security,

Defendant.
-----x

Transcript of a **Decision** held during a
Telephone Conference on April 18, 2024, the
HONORABLE DAVID E. PEEBLES, United States
Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: LEGAL AID SOCIETY OF MID-NEW YORK, INC.
221 South Warren Street, Suite 310
Syracuse, New York 13202
BY: ELIZABETH V. LOMBARDI, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION
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1 (The Court and all counsel present by
2 telephone.)

3 THE COURT: Let me begin by thanking counsel for
4 their presentations. I found this to be an interesting and,
5 frankly, close case.

6 The plaintiff has commenced this action pursuant to
7 42 United States Code Section 405(g) to challenge an adverse
8 determination by the Commissioner of Social Security. At the
9 outset of the hearing, we addressed the question of consent.
10 This matter was originally assigned to a different magistrate
11 judge. A consent form was filed by the plaintiff, it left
12 blank the identity of the magistrate judge to whom plaintiff
13 was consenting, but I ascertained from plaintiff's counsel
14 and confirmed with defense counsel that they consent to my
15 deciding this case.

16 The background is as follows: Plaintiff's date of
17 birth is in April of 1965, she is currently almost -- she is
18 now 59 years of age. She was 53 years old at the onset of
19 disability which was identified as February 1, 2019. She
20 stands 5 foot 5 inches in height and weighs 175 pounds, or
21 did at the time this matter was filed. She has a 12th grade
22 education and while in school attended regular classes.
23 Plaintiff is divorced but has a significant other in her
24 life.

25 In the past she's worked in many positions, most of

1 which involved factory work and assembly work. She was an
2 assembler of circuit boards, she's been a line worker, a
3 solderer and in various capacities and with three or four
4 different companies. She last worked in January of 2019.

5 Plaintiff suffers from lumbar back pain that has
6 been diagnosed by at least the consultative examiner in this
7 case as degenerative disc disease. She has degenerative
8 joint disease and arthritis in her thumbs bilaterally, and
9 vertigo, as well as levoscoliosis which I understand is a
10 condition that makes one's spine curve to the left.

11 Mentally, she has suffered in the past from
12 variously diagnosed conditions including post-traumatic
13 stress disorder, depressive disorder, opioid use disorder,
14 alcohol use disorder, stimulant use disorder, and has in the
15 past used marijuana, cocaine, heroin, methamphetamines, and
16 alcohol. She has been hospitalized for rehabilitation on a
17 couple of occasions. Plaintiff is also a smoker, smokes one
18 half pack of cigarettes per day. She receives care from
19 various sources, including a nurse practitioner with Homer
20 Family Practice, Jacqueline Gagen. She receives treatment at
21 the Guthrie Medical Center and has since March of 2021,
22 Family Counseling Services of Cortland, and Family and
23 Children's Society where she periodically sees Michelle
24 Reynolds who is an LMFT, or licensed marriage and family
25 therapist.

1 Her activities of daily living include some
2 cleaning, shower, dressing, she does laundry. Her
3 significant other does a majority of the cooking, cleaning,
4 and shopping. Plaintiff drives occasionally, she watches
5 television, and listens to music.

6 Procedurally, plaintiff applied for Title II
7 benefits protectively on March 1, 2021, alleging an onset
8 date of February 1, 2019. She claims at page 285 of the
9 Administrative Transcript to suffer from PTSD, depression,
10 anxiety, a back problem, arthritis, addiction, high blood
11 pressure, and vertigo. A hearing was conducted on July 14,
12 2022 by Administrative Law Judge Victoria Ferrer to address
13 plaintiff's application. ALJ Ferrer issued an unfavorable
14 decision on August 3, 2022. That became a final
15 determination of the agency on March 23, 2023, when the
16 Social Security Administration Appeals Council denied
17 plaintiff's request for review. This action was commenced on
18 April 19, 2023, and is timely.

19 In her decision, ALJ Ferrer applied the familiar
20 five-step sequential test for determining disability. At the
21 outset, she noted that plaintiff was last insured on
22 September 30, 2021.

23 She found at step one that plaintiff has not
24 engaged in substantial gainful activity since the alleged
25 onset date.

1 At step two she found that plaintiff suffers from
2 severe impairments that impose more than minimal limitations
3 on her ability to perform work functions, including
4 degenerative joint disease of the bilateral thumbs,
5 post-traumatic stress disorder, levoscoliosis, and vertigo.

6 At step three, she concluded that plaintiff's
7 conditions do not meet or medically equal any of the listed
8 presumptively disabling conditions set forth in the
9 Commissioner's regulations.

10 At step four, with the assistance of the vocational
11 expert testimony, the administrative law judge concluded that
12 plaintiff is capable of performing some of her past relevant
13 work, including the assembler position, as generally
14 performed pursuant to the DOT, or Dictionary of Occupational
15 Titles, but not as actually performed in the past by
16 plaintiff, and also could perform the position of solderer,
17 production line job, which was identified as a light and
18 unskilled position with an SVP of 2, and therefore, found it
19 unnecessary, the ALJ found it unnecessary to proceed to step
20 five and found that plaintiff was not disabled at the
21 relevant times.

22 As the parties know, the court's function in this
23 case is limited and the standard that I apply is deferential.
24 I must determine whether the resulting finding is supported
25 by substantial evidence, defined as such relevant evidence as

1 a reasonable person would find sufficient to support a
2 conclusion, and I must decide whether correct legal
3 principles were applied. As the court noted in *Brault v.*
4 *Social Security Administration Commissioner*, 683 F.3d 443
5 from 2012, this is an extremely deferential standard. The
6 Second Circuit confirmed that later in *Schillo v. Kijakazi*,
7 31 F.4th 64 from 2022.

8 In this case, plaintiff has raised several
9 contentions. The first one is that the administrative law
10 judge failed at step two to find degenerative disc disease to
11 be a medically determinable impairment. She argues that that
12 is not harmless error. The second concerns the evaluation of
13 medical opinions from LMFT Reynolds, Dr. Amanda Slowik, and
14 Dr. Ferrin and Dr. Fernandez, two state agency physicians.
15 Her third argument surrounds -- third and fourth argument
16 really -- surround the vocational expert testimony. There's
17 an allegation of a misclassification of past relevant work,
18 the argument being that plaintiff performed in composite
19 jobs, and also there's an alleged failure on the part of the
20 administrative law judge to resolve apparent conflicts
21 between the DOT and the vocational expert's testimony. The
22 last argument, which was partially withdrawn at least,
23 concerns the failure to obtain complete records from one of
24 plaintiff's providers, Guthrie Medical Center.

25 Turning first to step two, at step two of the

1 sequential evaluation, a claimant must show that he or she
2 has a medically determinable impairment that rises to the
3 level of a severe impairment. An impairment fails to reach
4 that threshold where it does not significantly limit a
5 claimant's physical or mental ability to do basic work
6 activities. The requirement to establish a severe impairment
7 at step two is *de minimus*, and is intended only to screen out
8 the truly weakest of cases. *McIntyre v. Colvin*, 758 F.3d 146
9 at 151, Second Circuit, 2014. The Second Circuit and other
10 courts have also noted that the mere presence of a disease or
11 impairment or establishing that a person has been diagnosed
12 or treated for a disease or an impairment is not by itself
13 sufficient to render a condition severe.

14 In this case, the administrative law judge
15 considered degenerative disc disease and discounted it as a
16 medically determinable impairment on page 14 of the
17 Administrative Transcript. I note, however, that Dr. Rita
18 Figueroa, who examined the plaintiff on behalf of the agency,
19 found that plaintiff does suffer from degenerative disc
20 disease, that's at 467.

21 The state agency physicians who spoke to
22 plaintiff's physical condition, Dr. M. Angelotti and Dr. J.
23 Rosenthal, did not characterize plaintiff's back, lumbar back
24 condition as degenerative disc disease but did conclude that
25 she suffers from lumbar spinal stenosis, that's at pages 100

1 and 124. I know it is plaintiff's burden to show medically
2 determinable impairments and resulting limitations. I think
3 in this case it was error not to include something, whether
4 it's lumbar spinal stenosis or whether it's degenerative disc
5 disease, at step two as severe.

6 The Commissioner argues that any such error would
7 be harmless because the administrative law judge found severe
8 impairments and proceeded through the five-step sequential
9 analysis. Plaintiff argues that that doesn't apply when the
10 administrative law judge finds a condition is not a medically
11 determinable impairment and cites *Penny Lou S. v.*
12 *Commissioner of Social Security*, 2019 WL 5078603 from the
13 District of Vermont, one of my friends and former colleagues
14 John Conroy.

15 In this case, I find that the error is harmless,
16 and that *Penny Lou S.* is distinguishable. In that case,
17 Judge Conroy reasoned that once the medically determinable
18 impairment was discounted, the symptoms associated with it
19 were no longer considered. This case is distinguishable
20 because the administrative law judge concluded that the
21 medical evidence in the record, including the results of
22 examination of the spine and musculoskeletal system by the
23 consultative examiner do show symptoms, citing Exhibit 6F,
24 and goes on to say, "Thus, independent of their origin, all
25 symptoms are considered herein in arriving at the residual

1 functional capacity." So the fear that was expressed by
2 Judge Conroy in *Penny Lou S.* was not present here, all
3 symptoms were considered. So I find that any error is
4 harmless.

5 Plaintiff next challenges the evaluation of medical
6 opinions. Because this application was filed after March 27,
7 2017, the case is subject to the revised regulations
8 regarding opinion evidence. Under those regulations, the
9 Commissioner no longer defers or gives any specific
10 evidentiary weight, including controlling weight, to any
11 medical opinions, including from medical sources, but instead
12 considers whether those opinions are persuasive by primarily
13 considering whether they are supported by and consistent with
14 the record in the case. 20 C.F.R. Section 416.920c(a).
15 Under the new regulations, an ALJ must articulate in his or
16 her determination as to how persuasive the medical opinions
17 of record are found and must explain how the administrative
18 law judge considered the factors of supportability and
19 consistency of those opinions.

20 In this case, the significant opinions in the
21 record primarily come from LMFT Michelle Reynolds and she
22 gives two opinions. One is found on page 534 of the record,
23 it is dated November 29, 2021, and is discounted because it
24 speaks to a matter reserved to the Commissioner. It states
25 merely that the plaintiff is temporarily unable to work and

1 that that will be the case for six months or more, and I find
2 that that was properly discounted by the administrative law
3 judge.

4 The second is dated July 1, 2022, it appears at 604
5 to 606 of the Administrative Transcript. Significantly, it
6 notes that plaintiff suffers from marked limitations in the
7 ability to interact with others, that's at page 605. The
8 interesting thing is that the administrative law judge deals
9 with these opinions at two points in her opinion, 26 to 27,
10 and then again 23 to 24, when it comes to LMFT Reynolds'
11 opinions. At page 24, significantly, it is stated that the
12 July 1, 2022 statements are persuasive "only to the extent
13 they can reasonably be accepted as consistent with the
14 objective medical and other evidence as described above,
15 including the result of examination by the consultative
16 examiner." The consultative examiner's report is also
17 included in the record, that is from Dr. Amanda Slowik,
18 August 25, 2021, at 458 to 462. In the medical source
19 statement from Dr. Slowik, it states that the claimant's
20 ability to interact adequately with supervisors, coworkers,
21 and the public is markedly limited, that's at page 461. So
22 it is, Dr. Slowik's opinion is consistent with LMFT Reynolds'
23 opinion when it comes to interaction.

24 When addressing Dr. Slowik's opinion that appears
25 at page 27, the administrative law judge acknowledges the

1 portion of the opinion that states that plaintiff's ability
2 to interact adequately with supervisors, coworkers, and the
3 public is markedly limited. Goes on to reject another marked
4 limitation noted in Dr. Slowik's opinion, that of sustaining
5 an ordinary routine or regulating her emotions, but does not
6 explain why she apparently partially at least rejected the
7 ability -- the marked limitation in the ability to interact
8 with supervisors and coworkers.

9 So given that, and particularly the statement about
10 LMFT Reynolds' opinion being accepted only to the extent it's
11 consistent with Dr. Slowik's opinion, I find error, and I am
12 unable to meaningfully judicially review to determine whether
13 the apparent rejection of that marked limitation is supported
14 by substantial evidence.

15 It is true that Dr. Ferrin and Dr. Fernandez, two
16 state agency consultants, found only modest limitations or
17 moderate limitations in those areas, Exhibits 2A-2-3, as the
18 Commissioner argues. But those individuals did not examine
19 the plaintiff. True, they examined the entire record
20 including, among other things, LMFT Reynolds' opinions and
21 Dr. Slowik's opinion, and so I'm always hesitant to
22 reweigh -- and I'm not reweighing -- the medical opinions of
23 record, because that would not be a proper court function,
24 but I find that there was a duty to explain the rejection of
25 that marked limitation so that the court could meaningfully

1 assess whether it was proper and supported by substantial
2 evidence. And while I agree that the Commissioner, as the
3 Commissioner argues, that a state agency determination may
4 provide substantial evidence, it is also clear that they are
5 entitled to less weight than someone who has examined and/or
6 treated the plaintiff. *Dana F. on behalf of O.E.H. v.*
7 *Berryhill*, 2019 WL 7067060, Northern District of New York
8 from December 23, 2019. And this is especially true in the
9 case of a mental impairment.

10 So I find error warranting remand. There are some
11 concerning aspects of the step four determination. I've
12 read, reread, and re-reread both plaintiff's testimony
13 concerning her jobs and the vocational expert's testimony.
14 The vocational expert testified that plaintiff was not
15 engaged in a composite job. I agree with the Commissioner
16 that it does not appear that there's a conflict, an obvious
17 conflict between the DOT and the vocational expert's
18 testimony that would call into play the requirement to elicit
19 further explanation. But I would hope on remand that the ALJ
20 and plaintiff's representative can elicit clear testimony
21 about plaintiff's job duties because obviously the vocational
22 expert was very confused and stated as much at one point,
23 page 75 of the Administrative Transcript, in fact reversed
24 his initial opinions and revisited them during his testimony.
25 And I'm not going to address the records issue at this point.

1 So to sum up, I am granting partial -- I am
2 granting judgment on the pleadings to the plaintiff, vacating
3 the Commissioner's determination, and remanding the matter
4 for further consideration, and particularly with regard to
5 the medical opinion evidence of record.

6 Thank you both for excellent presentations, I hope
7 you have a great day.

8 MR. PECK: Thank you, your Honor.

9 MS. LOMBARDI: Thank you, your Honor.

10 (Proceedings Adjourned, 12:25 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

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District of New York, DO HEREBY CERTIFY that
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Dated this 19th day of April, 2024.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RMR, CRR, CSR
Official U.S. Court Reporter